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In the Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF CHARLES F. DOLAN, BARRY BABCOCK, ALAN GERRY, H.F. LENFEST AND ROBERT ROSENCRANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KATHLEEN M. SULLIVAN
Counsel of Record
FAITH E. GAY
ROBERT C. JUMAN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave., 22nd Flr.
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Amici Curiae

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. *CERTIORARI* SHOULD BE GRANTED TO CLARIFY THAT THE LOSS CAUSATION PRINCIPLES OF *DURA PHARMACEUTICALS* ARE APPLICABLE IN THE WHITE-COLLAR CRIMINAL SENTENCING CONTEXT 6

A. *Dura* Has Had Salutary Effects In Civil Securities Litigation 6

B. *Dura* Likewise Should Apply To Loss Calculations In White-Collar Criminal Sentencing 7

II. FAILURE TO APPLY THE *DURA* PRINCIPLES TO CRIMINAL SENTENCING CREATES A RISK OF PENALIZING LEGITIMATE BUSINESS CONDUCT 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005) ..... passim
United States v. Berger, 587 F.3d 1038 (9th Cir. 2009) 11, 12, 13
United States v. Booker, 543 U.S. 220 (2005) 16
United States v. Mooney, 425 F.3d 1093 (8th Cir. 2005) 12, 16
United States v. Nacchio, 573 F.3d 1062 (10th Cir. 2009) 12, 15, 16
United States v. Olis, 429 F.3d 540 (5th Cir. 2005) ..... passim
United States v. Ruttkoske, 506 F.3d 170 (2d Cir. 2007) 9, 10, 11, 12

STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 3553(a) (2010) 15
2001 U.S.S.G. § 1B1.3 15
2001 U.S.S.G. § 2B1.1 ..... 3, 8, 11, 13

OTHER AUTHORITIES

Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 Fed. Sent'g Rep. 167 (2008) 7, 8
Scotland M. Duncan, Note, *Dura's Effect On Securities Class Actions*, 27 J.L. & Com. 137 (2008) 7
Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too*

TABLE OF AUTHORITIES – CONTINUED

Harsh?, 37 McGeorge L. Rev. 757 (2006) 7

Hearing Before the Comm. on the Judiciary of the U.S. Senate on Guidelines Drafted by the U.S. Sentencing Commission, 100th Cong., 1st Sess. 14 (1987) 17

Kevin P. McCormick, *Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 Tul. L. Rev. 1145 (2008) 17

Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783 (2005) 17

Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 Duke L.J. 1001 (2010) 15

INTEREST OF *AMICI CURIAE*[1]

Charles F. Dolan, Barry Babcock, Alan Gerry, H.F. "Gerry" Lenfest, and Robert Rosencrans ("*Amici*") are prominent American businessmen, all of whom founded cable television companies and grew them into successful businesses. Mr. Dolan is the founder of HBO and the founder and chairman of Cablevision Systems Corporation, the fifth largest cable provider in the United States. Mr. Rosencrans is the founder of U.A.–Columbia Cable and the founding Chairman of C-SPAN. Mr. Lenfest is the founder and former president and CEO of Suburban Cable, now part of Comcast. Mr. Gerry founded and was sole owner and chairman of Cablevision Industries, formerly the seventh largest cable provider in the United States. Mr. Babcock is the founder and chairman (retired) of Charter Communications.

Amici file this brief in support of this Court's grant of *certiorari* on the second question presented in the petition.[2] *Amici* file this brief to express the concerns

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[1] Pursuant to this Court's Rule 37.6, *Amici* affirm that no counsel for any party has authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *Amici* and their counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondent were notified of the intent to file this brief at least ten days prior to the filing of this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] *Amici* take no position with respect to the first question presented in the petition.

of American business leaders and corporate executives about the arbitrary nature of the loss enhancement used to impose the lengthy criminal sentences in this case. The courts below linked the loss enhancement vaguely to a decrease in stock price without requiring any proof that petitioners' conduct caused that decrease. Because *Amici* have extensive experience at the helm of the major cable corporations they founded, they are aware of the multitude of market factors unrelated to any misconduct that can influence the market price of a stock or other valuation of a company. *Amici* are thus well positioned to describe the problems caused by enhancing sentences based upon market factors over which the defendants have no control.

Amici agree that deterrence of white-collar crime is a value of vital importance, but believe that any such deterrent effect is eroded if white-collar sentences are arbitrary and disproportionate to the specific misconduct at issue. *Amici* believe that the business community will comprehend and respect federal white-collar criminal sentencing only if punishment is rationally related to the underlying illegality.

Amici file this brief in each of their personal capacities, and not on behalf of any of the companies with which they are now or were formerly associated.

INTRODUCTION

The Second Circuit's judgment allows a district court, in calculating the applicable range for a white-collar sentence under the U.S. Sentencing Guidelines, to ignore uncontroverted evidence that the criminal conduct at issue had no causal relationship to a proposed "loss" calculation. This reasoning effectively punishes defendants for market factors wholly unrelated

to the underlying criminal conduct. And because loss enhancement is the dominant factor enabling lengthy sentences for white-collar crimes, this reasoning allows the imposition of sentences that are not only arbitrary, but disproportionate.

The extreme length of petitioners' individual sentences here illustrates the point. U.S. Sentencing Guidelines § 2B1.1 requires a district court to make a "reasonable estimate of the loss" caused by the alleged misconduct "based on available information." Instead of doing so, the district court here picked an arbitrary number ($100 million) vaguely tied to a stock price decrease, with no analysis of whether or to what extent the alleged misconduct, rather than other unrelated factors, caused that price decrease. That arbitrarily chosen "loss" amount resulted in a *26 level enhancement*, increasing the applicable Guidelines range from 33-41 months (which petitioners have already served) to 15 years for John Rigas, now 85 years old, and 17 years for Timothy Rigas (leaving them still subject to 12- and 14-year sentences as adjusted).

These harsh sentences likely would have been avoided if the lower courts had followed, in the white-collar criminal context, the teachings of this Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). Just as stringent proof of loss causation is required in the civil context to discourage claims based on market factors unrelated to misconduct, so such proof is necessary in the white-collar criminal context to avoid disproportionate sentences that make white-collar punishment appear arbitrary to both the business community and the broader public. The Second Circuit thus erred in holding that the loss in this case "easily exceeds $100 million" without any ex-

planation of how this figure was derived or any acknowledgment that a publicly traded stock might vary in price for a multitude of reasons unrelated to an offense. The Court should grant review to clarify this important area of white-collar sentencing law.

SUMMARY OF ARGUMENT

Amici urge the Court to grant the petition to address and resolve the confusion surrounding the appropriate method of calculating loss under the Sentencing Guidelines in cases where the alleged conduct affects the stock price of a public company. The Second and Fifth Circuits have explicitly applied in the criminal sentencing context the loss calculation principles that this Court required in *Dura* in civil securities fraud cases. Yet the Ninth Circuit has explicitly declined to apply these principles in the criminal sentencing context, and in the present case, the Second Circuit backed away from its prior decision on this issue. The Eighth and Tenth Circuits have similarly split on the question of whether the *Dura* principles should apply to sentencing enhancements in insider trading cases.

This confusion among the lower courts creates a serious risk that white-collar defendants will face uneven and in some cases crushing sentencing exposure from loss enhancements that are based in part on legitimate conduct. This risk extends beyond petitioners to the general deterrent effect of white-collar criminal sanctions. If the perception of fairness in sentencing is lost because legitimate conduct is penalized and the vagaries of the stock market can translate to a lifetime in prison, the nation's business leaders will lose respect for, and cease to be properly guided by, the scheme of

white-collar criminal penalties that are designed to deter misconduct in the first place.

ARGUMENT

The court below affirmed that, in calculating a defendant's loss enhancement based upon an alleged effect on stock price, a district court is free to ignore uncontradicted evidence casting doubt on the causal relationship between the offense conduct and the decline in stock price. This judgment is inconsistent with both economic reality and this Court's *Dura* decision, which both the Second Circuit (in a prior case) and the Fifth and Tenth Circuits have held applicable to criminal cases.

In white-collar criminal cases, the Sentencing Guidelines place a dominant emphasis on the concept of loss. Accordingly, in cases where the illegal conduct relates to an alleged effect on the stock price of a large public company, the Guidelines can be interpreted to call for extremely high sentences. For these sentences to have appropriate deterrent effect, they must be perceived as rational, fair, and based on economic reality. Accordingly, it is crucial that district courts, when sentencing criminal defendants for misconduct that affected the stock price of a public company, determine which losses were caused by the offense conduct and which were caused by extraneous factors. The failure to recognize this economic reality not only leads to unfair and disproportionate sentences like the ones in this case, but also weakens the public's perception of fairness and rationality in criminal sentencing and diminishes the deterrent effect of white-collar criminal sanctions within the business community.

I. *CERTIORARI* SHOULD BE GRANTED TO CLARIFY THAT THE LOSS CAUSATION PRINCIPLES OF *DURA PHARMACEUTICALS* ARE APPLICABLE IN THE WHITE-COLLAR CRIMINAL SENTENCING CONTEXT

A. *Dura* Has Had Salutary Effects In Civil Securities Litigation

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court unanimously held that, when evaluating civil securities fraud allegations, courts must take into account "the tangle of factors" affecting stock price. *Id.* at 343. The *Dura* decision is based on the simple, unavoidable, economic reality that a publicly traded stock may vary in price for a multitude of reasons, including "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Id.*

Because a plaintiff in a civil securities fraud case is bound, like other plaintiffs, by the "traditional elements of causation and loss," *id.* at 346, this Court held the Ninth Circuit had erred in permitting a plaintiff's allegations to proceed despite the plaintiff's failure to distinguish between the alleged misconduct and other contributing factors to the price of a publicly traded stock. By requiring courts to consider the economic environment surrounding publicly traded stocks, the *Dura* decision sought to reduce abusive litigation and coercive settlements, while still ensuring that legitimate lawsuits could be pursued.

Although only a few years have passed, empirical evidence suggests that *Dura* has had precisely the intended effect. In the wake of *Dura*, "the number of

class action filings has declined, the average settlement amount has increased, and the number of lower and relatively quick settlements has declined." Scotland M. Duncan, Note, Dura's *Effect On Securities Class Actions*, 27 J.L. & Com. 137, 167 (2008). These results indicate that *Dura* has reduced the amount of frivolous class action securities litigation. *Id.*

B. *Dura* Likewise Should Apply To Loss Calculations In White-Collar Criminal Sentencing

Just as *Dura* applied economic reality to reduce the impact of frivolous civil securities litigation, so its principles should be applied to reduce the risk of grossly disproportionate sentences in white-collar criminal sentencing. As petitioners' case demonstrates, the need for stringent loss causation requirements may well be even greater in the criminal context, where an inattention to economic reality can translate into a lifetime in prison for an unlucky defendant.

Since the passage in 2001 of the "Economic Crime Package" amendments, the Sentencing Guidelines have prescribed extremely high sentences for high-level corporate officials. *See, e.g.*, Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 Fed. Sent'g Rep. 167, 167 (2008). The main reason for these high sentences is the Guidelines' use of enhancements based on economic loss, which in white-collar cases is "the single most important factor in the application of the Sentencing Guidelines." *See* Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGeorge L. Rev. 757, 767 (2006). Critics have noted that this disproportionate focus on loss fails to distinguish "between more and less culpable defen-

dants and instead sweeps virtually any significant participant in a large corporate fraud into the same unrealistically punitive category." Bowman, *supra*, at 168.

The assignment of independent weight to the loss calculation constitutes a form of double-counting, because high loss amounts are frequently correlated with other sentencing enhancements, such as sophisticated means, multiple victims, and the number of participants. "[A]ny corporate officer found guilty of a large-loss corporate fraud is virtually certain to be subject to all of them." *Id.* at 170. Moreover, because a one-level increase at the top of the sentencing table results in a much larger change in the sentencing range than a one-level increase at the bottom of the sentencing table, the huge increases in offense level caused by large loss calculations create disproportionately large increases in applicable sentencing ranges. *Id.*

The Guidelines define "actual loss" as "the reasonably foreseeable pecuniary harm that *resulted* from the offense." 2001 U.S.S.G. § 2B1.1 cmt. n.2(A)(i) (emphasis added). In other words, loss is defined as the harm (and only the harm) that actually "resulted from the offense." In a case involving a publicly traded company, this critical driver of the defendant's sentence will often be based on an analysis of the company's stock price. If this analysis is done recklessly, without proper attention to which harms were actually caused by the illegal conduct, it can too easily result in a sentence of decades or even life imprisonment untethered to the underlying offense. Accordingly, if criminal sentences in white-collar cases are to be viewed as fair and proportionate, especially by the business community, it is crucial that this stock price analysis be seen as rational and as reflecting economic reality.

As the Fifth Circuit recognized in *United States v. Olis*, 429 F.3d 540, 545-46 (5th Cir. 2005), and the Second Circuit recognized in *United States v. Rutkoske*, 506 F.3d 170, 179 (2d Cir. 2007), a loss calculation involving publicly traded stock that does *not* attempt to distinguish between the effects of the alleged misconduct and the effects of general market conditions is inherently flawed and thus unreasonable.

In *Olis*, the defendant was a tax lawyer and accountant who participated in a scheme to artificially prop up a public company's cash flow. The defendant's sentence was enhanced by twenty-six levels solely because of the district court's loss calculation. While the Fifth Circuit recognized that the district court was required to make only a "reasonable estimate of loss," the Fifth Circuit noted that this standard did not justify *any* chosen method of calculating loss, but only those methods that are "legally acceptable." *Id.* at 545. After noting that "actual loss" under the Sentencing Guidelines incorporates both factual causation and legal (or proximate) causation, *see id.*, the Fifth Circuit found that *Dura* provided the necessary guidance for determining loss causation where the gravamen of the offense conduct is securities fraud because the civil damages measure "is attuned to stock market complexities." *Id.* at 546. The court noted numerous decisions recognizing that, "because a company's stock price is affected before and after the fraud by numerous extrinsic market influences as well as [by] other business decisions by the company, the calculation of loss attributable to securities fraud requires *careful analysis*," and emphasized the "importance of thorough analyses *grounded in economic reality*." *Id.* at 547 (emphasis added).

In *Rutkoske*, the defendant was charged with a scheme to artificially inflate the price of a publicly traded stock. In sentencing the defendant, the district court adopted a loss calculation method that failed to determine the extent to which the defendant's conduct, as opposed to market or other forces, caused shareholders' losses. 506 F.3d at 178. The Second Circuit found that this "basic failure at least to approximate the amount of the loss caused by the fraud, without even considering other factors," required a remand. *Id.* at 180. Noting with approval the Fifth Circuit's decision in *Olis*, which applied *Dura* principles to calculate the loss amount for a criminal sentence, the Second Circuit rejected the Government's contention that the principles set forth in *Dura* should not apply in a criminal case. The Second Circuit saw "no reason why considerations relevant to loss causation in a civil fraud case should not apply, at least as strongly, to a sentencing regime in which the amount of loss caused by a fraud is a critical determinant of the length of a defendant's sentence," holding that, "[n]ormally, expert opinion and some consideration of the market in general and relevant segments in particular will enable a sentencing judge to approximate the extent of loss caused by a defendant's fraud." *Id.* at 179-80.

Significantly, *Rutkoske* also held that the *Dura* principles should not be overlooked or ignored merely because the sentencing court is required to make only a "reasonable estimate" of loss. *Rutkoske* remanded the case for further fact-finding despite the Government's contention that the stock at issue traded in a "thin" market and that the price of the stock "plummeted" after the scheme "unraveled." *Id.* at 180. The Second Circuit held that, even if these facts tended to minimize the effect of market forces on the underlying stock

price, they did not preclude the effect of market forces, and so a *Dura* analysis was still required. *Id.* Moreover, *Rutkoske* recognized that an analysis of unrelated market forces should be undertaken even where the share price of a stock drops "so quickly and so extensively immediately upon disclosure of a fraud that the difference between pre- and post-disclosure share prices is a reasonable estimate of loss caused by the fraud," *id.* at 179, citing the example of a fraud disclosed just as the dot-com bubble burst which "might cause most, *but not necessarily all*, of the decline in previously high-flying technology stocks." *Id.* at 180 (emphasis added).

By contrast, the Ninth Circuit has rejected out of hand the applicability of the *Dura* principles to criminal sentencing. *See United States v. Berger*, 587 F.3d 1038, 1043 (9th Cir. 2009). Based on the mistaken notion that "[t]he *Dura Pharmaceuticals* Court's concern is not implicated in the criminal sentencing arena," *id.* at 1044, the Ninth Circuit interpreted *Dura* as applying solely to cases involving the fraud-induced overvaluation of stock, and held that, because the Sentencing Guidelines require a court to make only a "reasonable estimate of the loss," it is permissible for a court in a criminal sentencing case to ignore the *Dura* principles. Similarly, in the decision below, the Second Circuit ignored the *Dura* principles, noting that a sentencing court "need only make a reasonable estimate of the loss." 2001 U.S.S.G. § 2B1.1 cmt. n.3(C).

There thus exists an explicit conflict between *Berger*, which held the *Dura* principles inapplicable to the Guidelines because they require only a "reasonable estimate of the loss," and *Rutkoske*, which recognized that, where a court is engaged in the effort to make a

"reasonable estimate" of the loss, it must still consider external factors that may have affected stock price, *even if* those external factors may have had only a minimal effect. Under *Rutkoske*, relieving the district court of the need to calculate loss with total precision is not a license, as it is under *Berger*, for the court to ignore other events that may have contributed to the decline in a stock price.[3]

This Court issued its decision in *Dura* precisely because the Ninth Circuit had adopted a standard for civil securities fraud suits that would have permitted plaintiffs to recover under the securities laws even where the alleged misrepresentations had not proximately caused any economic loss to the plaintiff. *See Dura*, 544 U.S. at 346 ("[W]e find the Ninth Circuit's approach inconsistent with the law's requirement that a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss."). The same logic applies in white-collar criminal sentencing, with even more force. The Ninth Circuit's approach in *Berger*, like the Second Circuit's approach in this case, improperly permits a criminal sentence to be calculated based on

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[3] There is also an explicit conflict between the Eighth and Tenth Circuits as to whether the *Dura* principles should be applied to determine the gain earned by a defendant convicted of insider trading. In *United States v. Mooney*, 425 F.3d 1093, 1100 n.6 (8th Cir. 2005), the Eighth Circuit found the *Dura* principles incompatible with the Sentencing Guidelines. By contrast, in *United States v. Nacchio*, 573 F.3d 1062, 1077 (10th Cir. 2009), the court, citing *Olis*, *Rutkoske*, and the dissent in *Mooney*, applied *Dura* principles to avoid sentencing the defendant based on "unrelated gyrations of the market."

declines in stock prices that were not proven to have been caused, much less proximately caused, by the defendants' conduct. This Court should intervene to clarify that the *Dura* principles apply with equal force to the all-important loss factor in white-collar criminal sentencing.

The Sentencing Guidelines themselves support this view. The Ninth Circuit in *Berger*, like the Second Circuit in this case, focused on the phrase "a reasonable estimate of the loss" without considering the remainder of the Guidelines commentary. That commentary does not merely state that the court "need only make a reasonable estimate of the loss," but goes on to state explicitly that, when a court is making this reasonable estimate, "[t]he estimate of the loss *shall be based on available information*" 2001 U.S.S.G. § 2B1.1 cmt. n.2(C) (emphasis added).[4]

The Guidelines themselves thus align with the teaching of *Dura*: any *reasonable* calculation of loss based on stock price decline must take into account *all* of the reasons for that decline, and must disaggregate the reasons that are related and unrelated to the underlying offense conduct. In a case involving a publicly traded company, the "available information" necessarily includes "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events" that likely had an effect on the stock price but are unrelated to the alleged criminal conduct.

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[4] Similarly, in the 1995 Guidelines at issue in *Berger*, Comment 8 to Section 2F1.1 stated, "The court need only make a reasonable estimate of the loss, *given the available information*" (emphasis added).

It is undisputed that, in the instant case, the district court ignored all such "available information," including the undisputed testimony of defendants' expert, and chose instead to estimate the loss amount by reference to the "press reaction" to the disclosure of debt. *See* Pet. App. 44a. The district court made no effort to recognize "the tangle of factors affecting price" recognized in *Dura,* 544 U.S. at 343, and ignored the myriad of factors unrelated to the alleged misconduct that might have contributed to the decrease in the share price of the stock—including, for instance, the fact that the stocks of virtually all U.S. cable companies fell dramatically and precipitously during the first eight months of 2002, or that public questions concerning Adelphia's financial reporting were raised by its own auditors in Spring 2002.

The court of appeals, in affirming, stated that the loss figure "easily exceeds $100 million," Pet. App. 19a, without any explanation of how that figure was derived or why it is "easy" to do so. Similarly, the court of appeals observed that the district court reasoned that a loss of only $0.50 per share would satisfy the $100 million threshold for the sentencing adjustment applied to the count. *See* Pet. App. 20a. But *no one ever did the analysis* to demonstrate that even this $0.50 per share is an accurate figure in light of the numerous unrelated events occurring in the three months after the March 27 disclosures, including the cable industry's general market decline. The Rigases' prison sentences (in John's case, effectively a life sentence) should not be allowed to rest on a general market decline.

II. FAILURE TO APPLY THE *DURA* PRINCIPLES TO CRIMINAL SENTENCING CREATES A RISK OF PENALIZING LEGITIMATE BUSINESS CONDUCT

The significance of this case extends far beyond the injustice facing petitioners. Just as *Dura*'s stringent loss causation requirement was necessary to combat the potential for numerous frivolous lawsuits in the civil context, so *Dura*'s principles are necessary to prevent disproportionate and overbroad sentences in the criminal context.[5]

Federal criminal sentencing is supposed to be individualized. "[I]t is axiomatic that a critical objective of federal sentencing is the imposition of punishment on the defendant that reflects his or her culpability for the criminal offense (rather than for the unrelated gyrations of the market)." *Nacchio*, 573 F.3d at 1077. A sentencing court is supposed to craft a sentence that reflects a particular defendant's culpability. *See, e.g.*, 18 U.S.C. § 3553(a) (2010) (a sentencing court is obliged to consider "the nature and circumstances of the offense and the history and characteristics of the defendant"); 2001 U.S.S.G. § 1B1.3(a)(3) (noting that re-

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[5] "Since the Sarbanes-Oxley Act of 2001, the Guidelines have recommended excessively high sentences for white-collar crimes. The recommended sentences for high-loss white-collar crimes eclipse the sentences typically imposed for murder and serial child molestation. In some cases, the recommendations are so high that they are 'literally off the chart.'" Derick R. Vollrath, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White Collar Criminal Cases*, 59 Duke L.J. 1001, 1021 (2010) (citations and alterations omitted).

levant conduct used to determine the Guidelines range includes "all harm that resulted from the acts and omissions" of the defendant and "all harm that was the object of such acts and omissions"). Uniformity in sentencing means not just similar sentences for violations of the same statute, but also "similar relationships between sentences and real conduct." *United States v. Booker*, 543 U.S. 220, 253-54 (2005).

These principles of individual responsibility require that criminal sentences be based on the harm actually caused by the offense conduct. If sentencing courts are not required to engage in "careful analysis" that is "grounded in economic reality," *Olis*, 429 F.3d at 547, they run the risk of penalizing legitimate conduct, and holding defendants responsible for market conditions beyond their, or anyone's, control. The danger is especially great in the case of public companies where even slight vagaries of the market can result in changes in market capitalization on the order of hundreds of millions, and even billions, of dollars. A defendant's sentence should not depend on whether a criminal investigation occurred during a financial crisis rather than a period of prosperity. *Cf. Nacchio*, 573 F.3d at 1083-84 (noting the potential for equally situated defendants to receive unequal sentences where a sentencing regime fails to account for unrelated market events); *Mooney*, 425 F.3d at 1107 (Bright, J., dissenting) (same).

Allowing prohibitively lengthy criminal sentences to be based in part on stock price movements unrelated to the offense conduct erodes respect for the fairness of the sentencing process, and therefore undermines the deterrent effect of the laws underlying those sentences. "[U]nwarranted disparity breeds disrespect for the law,

and it undermines public confidence in our system." *Hearing Before the Comm. on the Judiciary of the U.S. Senate on Guidelines Drafted by the U.S. Sentencing Commission*, 100th Cong., 1st Sess. 14 (1987) (statement of Judge Wilkins).

Moreover, penalizing defendants for losses bearing no proven relationship to their misconduct will chill legitimate and necessary business activity by the companies that are the foundation of our economy. *See, e.g.*, Kevin P. McCormick, *Untangling the Capricious Effects of Market Loss in Securities Fraud Sentencing*, 82 Tul. L. Rev. 1145, 1175 (2008) ("If pure business decisions that bring no individual or personal gain to a corporate executive can translate to a lifetime in prison depending on the ensuing response by the stock market, executives might no longer have the desire to take many different types of perfectly legal actions that might benefit the company and the economy as a whole."); Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783, 802 (2005) (noting that "overdeterrence occurs when people refrain from lawful conduct because they fear involvement with the criminal justice system"). Review by this Court in this case thus will help advance both the goals of fairness and of effective deterrence.

CONCLUSION

The petition for a writ of certiorari should be granted as to the second question.

Respectfully submitted,

KATHLEEN M. SULLIVAN
Counsel of Record
FAITH E. GAY
ROBERT C. JUMAN
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000

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Counsel for Amici Curiae